

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
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Amendment of Section 73.202(b) )  
Table of Allotments )  
FM Broadcast Stations )  
Enfield, New Hampshire; Hartford and )  
White River Junction, Vermont; and )  
Keeseville and Morrisonville, New York )  
 )

MB Docket No. 05-162

Federal Communications Commission  
Office of Secretary

To: Office of the Secretary

Attention: Chief, Media Bureau

**MOTION TO STRIKE OR LEAVE TO FILE COMMENTS**

Great Northern Radio, LLC ("Great Northern"), pursuant to Section 1.415 of the Commission's Rules and by its attorneys, hereby file its opposition to the "Motion to Dismiss Petition for Rule Making" filed by Hall Communications, Inc. ("Hall") on July 7, 2005 (the "Hall Motion").<sup>1</sup> The Hall Motion must be dismissed as an untimely and unauthorized pleading that reiterates legal arguments previously raised by Hall. If the Commission does consider the merits of the Hall Motion, the public interest is better served by granting the rule making petition filed by Nassau Broadcasting, III, L.L.C. (the "Nassau Petition") than the counterproposal submitted by Hall (the "Hall Counterproposal"). The Nassau Petition would provide first local service to two communities, whereas the Hall Counterproposal would provide a first local service to only one community. If the Commission accepts the Hall Motion, fairness dictates Great Northern be given leave to file these comments in order to provide a complete and accurate record for this proceeding. In support thereof, the following is respectfully submitted.

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<sup>1</sup> Because the Hall Motion is an unauthorized pleading, there is no time limit for when Great Northern may file this pleading. However, out of respect for the Commission's rules and procedures, Great Northern is filing this motion in as expeditious a manner as possible.

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### **Introduction**

This proceeding presents the Commission with two mutually exclusive rule making proposals. The Nassau Petition proposes a new first local service to the communities of Morrisonville, New York and Enfield, New Hampshire while providing first local service to the communities of Hartford and White River Junction, Vermont and Keeseville, New York. The Commission recognized the public interest benefits presented in the Nassau Petition, and released the Notice of Proposed Rule Making that commenced this proceeding.<sup>2</sup> Hall filed the Hall Counterproposal in response to the NPRM. But whereas the Nassau Petition proposes a first local service to the communities of Enfield and Morrisonville, the Hall Counterproposal proposes only one first local service, to the community of Morrisonville, while precluding a first local service to the community of Enfield. The Hall Counterproposal would nullify Great Northern's timely filed comments expressing an interest in the proposed vacant allotment for Enfield.

### **Procedural Matters**

The Commission should dismiss the Hall Motion as an untimely and unauthorized pleading. The Commission's Rules do not allow the filing of pleadings after the comment and reply deadlines set forth in the NPRM.<sup>3</sup> The NPRM established specific filing deadlines to ensure that the public may comment on the Nassau Petition and avoid the element of surprise. Comments in support of or opposition to the Nassau Petition, as well as the filing of counterproposals, should have been filed by May 31, 2005. Responses to these pleadings should have been filed by June 14, 2005. Hall, Nassau, Great Northern and Radio Broadcasting

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<sup>2</sup> See *Enfield, New Hampshire; Hartford and White River Junction, Vermont; and Keeseville and Morrisonville, New York*, 20 FCC Rcd 7587 (Aud. Div. 2005) (the "NPRM").

Services, Inc. timely filed comments on the merits of the Nassau Petition. Nassau in turn timely filed reply comments. This completes the pleading cycle with respect to the merits of the Nassau Petition.<sup>4</sup> Section 1.415(d) prohibits the filing of additional comments unless specifically requested or authorized by the Commission.

The Hall Motion was filed well after the deadline for filing either comments or reply comments in this proceeding,<sup>5</sup> regurgitates legal arguments previously raised in the Hall Counterproposal, provides no basis for the untimely and unauthorized pleading, and did not seek leave from the Commission to file the pleading. The parties to this proceeding have the right to expect that the proceedings are conducted in a fair and orderly manner. The filing of unauthorized pleadings such as the Hall Motion delay consideration of this proceeding, thereby delaying new service to the public. In filing the untimely and unauthorized Hall Motion, Hall showed a blatant disregard for the Commission's Rules and the filing deadlines established in the NPRM. The Commission should not reward such behavior and should dismiss the Hall Motion without any further consideration.

In the unlikely event that the Commission should accept the Hall Motion, Great Northern requests leave to submit these comments. The Hall Motion, filed on July 7, 2005, disregards the filing deadlines established in the NPRM and is an obvious attempt by Hall to have the last word in this proceeding. Any legal arguments in the Hall Motion could and should have been raised by the deadline for filing comments in this proceeding. If the Commission accepts the Hall Motion, the Commission will have given Hall an additional opportunity to comment in this proceeding in contravention of Section 1.415 while denying Great Northern and other parties to

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<sup>3</sup> See 47 C.F.R. §1.415.

<sup>4</sup> The Commission will issue a future public notice inviting comments on the merits of the Hall Counterproposal.

this proceeding with an opportunity to respond. Procedural fairness requires that the Commission grant Great Northern leave to submit these comments.

### **Legal Arguments**

The Hall Motion argues that Hall has a valid expression of interest in the vacant allotment in Keeseville, the expression of interest prevents reallocation of the vacant allotment from Keeseville to Morrisonville, which in turn renders the Nassau Petition procedurally defective, and therefore requires dismissal of the Nassau Petition in its entirety. The Hall Motion misinterprets Commission precedent to reach these incorrect conclusions.

The mere expression of interest in a vacant allotment does not preclude reallocation of a vacant channel to a new community, and the Hall Motion cites no cases supporting a different conclusion. The Hall Motion relies upon *Martin, Tiptonville and Trenton, Tennessee*<sup>6</sup> and *Driscoll, Gregory and Robstown, Texas*<sup>7</sup> in support of the proposition that expression of interest in a vacant allotment precludes reallocation, but these cases involved the deletion of a vacant allotment that represented a potential first local service to a community. The Nassau Petition, however, proposes a preferential arrangement of the FM Table of Allotments that includes replacing the vacant but unrealized first local service in Keeseville with an operational first local service. The Nassau Petition does not deprive Keeseville of a first local service. The proposed reallocation of the vacant channel in Keeseville therefore is readily distinguishable from the outright deletion of a vacant allotment.

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<sup>5</sup> The NPRM established May 31, 2005 and June 14, 2005 as the deadlines for filing comments and reply comments, respectively.

<sup>6</sup> 13 FCC Rcd 17767 (Aud. Div. 1998), *recon. denied*, 15 FCC Rcd 12747 (Aud. Div. 2000) ("*Martin I*").

<sup>7</sup> 10 FCC Rcd 6528 (Aud. Div. 1995) ("*Driscoll*").

Another difference between the Nassau Petition and *Martin I* and *Driscoll* is that in each of those cases the Commission specifically stated in the accompanying Notice of Proposed Rule Making that the Commission would not delete the vacant allotment if the public expressed interest in the allotment. If, as the Hall Motion claims, Commission case law is so well established as to preclude the reallocation of the Keeseville allotment because of a valid expression of interest, or if the Commission was required to take official notice of Hall's expression of interest in the vacant allotment in Keeseville from a previous rule making proceeding, the Commission would have included such a statement in the NPRM in this proceeding either inviting expressions of interest in the vacant allotment at Keeseville or seeking comment on the prior expression of interest. The NPRM did not include such a statement. The absence of this statement makes it readily apparent that reallocation of a vacant allotment is permissible under Commission case law, even if the Commission were to take official notice of Hall's expression of interest in the vacant allotment at Keeseville.

An expression of interest in a vacant FM allotment does not preclude subsequent modification of the allotment. In *Bethel Springs, Martin, Tiptonville, Trenton and South Fulton, Tennessee*,<sup>8</sup> the successor case to the *Martin I* case cited in the Hall Motion, the Commission downgraded a vacant FM allotment in Tiptonville from a Class C3 to a Class A facility. In *Martin I*, the rule making proponent proposed to downgrade the vacant allotment in Tiptonville in order to upgrade another allotment in Martin, a Priority 4 consideration. The Commission in *Martin I* denied the proposal, holding that the public interest in retaining the vacant allotment in Tiptonville outweighed upgrading an existing allotment in Martin. In *Martin II*, the same rule making proponent filed the same rule making proposal, but with one notable difference: the new

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<sup>8</sup> 17 FCC Rcd 14472 (Aud. Div. 2002).

petition not only would upgrade the allotment in Martin, but would change the community of license for the allotment from Martin to Fulton, which did not have a first local service.

The Commission in *Martin II* approved the proposal to downgrade the vacant allotment in Tiptonville, because the public interest benefit of providing a first local service to Fulton outweighed downgrading the vacant allotment.<sup>9</sup> The Commission stated that the provision of a first local service triggered one of the higher FM allotment priorities while not depriving Tiptonville of a first local service.<sup>10</sup> The Commission further held that the downgrade was in the public interest because the vacant allotment would not result in the loss of any actual service.<sup>11</sup> Finally, the Commission held that even if official notice was taken of *Martin I* as the functional equivalent of an expression of interest in retaining a Class C3 channel in Tiptonville, the aforementioned public interest benefit of a new first local service outweighed that expression of interest.<sup>12</sup>

The fact pattern presented in this proceeding is similar to the rule making proposals rejected in *Martin I* and granted in *Martin II*. The Commission denied the original rule making petition to modify the FM Table of Allotments for White River Junction, Hartford and Keeseville because the proposal fell under Priority 4, the lowest of the FM allotment priorities.<sup>13</sup> The Nassau Petition must be considered under Priority 3, a higher allotment priority, because it proposes first local service to two new communities. The public interest benefit of first local service to two communities, combined with retention of a first local service in Keeseville, outweighs the retention of the vacant allotment in Keeseville. The reallocation of the vacant

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<sup>9</sup> *Id.* at 14476.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *Keeseville, New York, Hartford and White River Junction, Vermont*, 19 FCC Rcd 16106 (Aud. Div. 2004) (“*Keeseville I*”).

allotment from Keeseville would not result in the loss of any actual service. The Nassau Petition is superior to the rule making proposal approved in *Martin II* because the Nassau Petition would provide a first local service to Keeseville with an operational station while creating two new first local services.

Assuming *arguendo* that Hall has expressed a valid interest in the vacant allotment for Keeseville preventing reallocating the allotment for this community, the appropriate remedy is not to dismiss the Nassau Petition but instead consider the remainder of the Nassau Petition on its merits. In the process of considering a rule making petition, the Commission does not vote a petition up or down; instead the agency will grant those portions of the petition that complies with the Commission's Rules while denying the remainder that does not. Hall cites no cases for the proposition that the expression of interest in the Keeseville allotment requires dismissal of the entire Nassau Petition.

A comparison of the modified Nassau Petition with the Hall Counterproposal favors granting the Nassau Petition. Even if the vacant allotment remains in Keeseville, the comparison of the competing proposals is between a new first local service in Enfield (Nassau Petition) and a new first local service in Morrisonville (Hall Counterproposal). The United States Census lists the population of Enfield as 4,618 persons and the population of Morrisonville as 1,702 people. The population of Enfield is more than twice the size of Morrisonville. The public interest is better served by allocating a vacant allotment to Enfield as the larger community than allocating a vacant allotment to Morrisonville. The Nassau Petition further better serves the public interest because it permits the station licensed to White River Junction to operate with the full facilities of a Class A station instead of the lesser grandfathered facilities.

### Conclusion

The Commission should grant the Nassau Petition in its entirety. The Nassau Petition better serves the public interest by providing new service to the communities of Morrisonville and Enfield while not depriving the communities of White River Junction, Hartford and Keeseville of first local service. The Hall Counterproposal is designed specifically to prevent a first local service to Enfield, depriving more than 4,600 persons of a first local service. Even if the Commission should agree with Hall and retain the vacant allotment in Keeseville, the Nassau Petition remains superior to the Hall Counterproposal because Enfield is a larger community than Morrisonville.

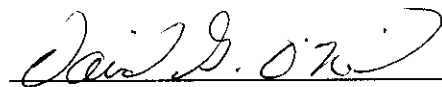
The Commission should dismiss the Hall Motion as an untimely and unauthorized pleading that seeks to gain a competitive advantage in this proceeding. The dismissal of the Hall Motion without consideration is appropriate given Hall's disregard for the Commission's rules and procedures.

WHEREFORE, FOR THE FOREGOING REASONS, GREAT NORTHERN RADIO, LLC respectfully requests that the Commission deny the Motion to Dismiss Petition for Rule Making filed by Hall Communications, Inc. and grant the Nassau Petition in its entirety.

Respectfully submitted,

GREAT NORTHERN RADIO, LLC

By:



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July 21, 2005

Its Counsel



CERTIFICATE OF SERVICE

I, Takayo Burris, a secretary in the law firm of Rini Coran, PC, hereby certify that on the 21<sup>st</sup> day of July, 2005, a copy of the foregoing "Motion to Strike or Leave to File Comments" is being sent via electronic mail, to the following:

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